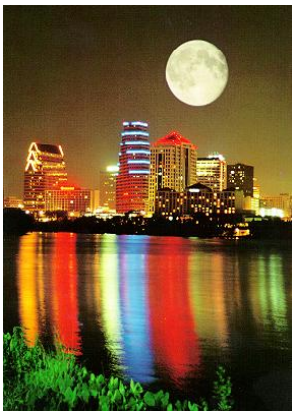

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G&S Vol. 9, No. 20 - May 21, 2001

Case Name: Douglas Charles Gollihar v. The State of Texas

- OFFENSE: Theft
- COURT OF APPEALS: Texarkana 1999
- C/A CITATION: 991 S.W.2d 303
- C/A RESULT: Conviction Reversed
- COUNTY: Hood
- C.C.A. CASE No. 0669-99
- DATE OF OPINION: May 16, 2001
- JUDGE: Meyers, J.
- DISPOSITION: Court of Appeals Reversed

Case Note: Although there is only one issue here, there are five separate and distinct lines of holdings. I have set them out as clearly as I possibly can and, hopefully, this summary won't be as confusing as is the opinion, which should probably be added to our "Hall of Shame" for poorly written and unnecessarily confusing opinions.

G/S 551 Sufficiency of the Evidence / Variance: The indictment in this case alleged that Appellant had stolen "one Go-Cart Model 136202, of the value of less than $1500." A Wal-Mart employee testifying for the State at trial answered affirmatively when asked if the cart taken was model number 136203. There was no other evidence as to the model number of the cart. The jury charge tracked the language from the indictment, requiring the jury to find that Appellant stole a model number 136202 go-cart. Relying on Ortega v. State, 668 S.W.2d 701 (Tex.Cr.App. 1983), and noting that Ortega had not been overruled by Malik v. State, 953 S.W.2d 234 (Tex.Cr.App. 1997)(see Greenwood & Schulman, (see G&S, Vol. 5, No. 36; September 15, 1997), the Court of Appeals found the evidence was insufficient and reversed the conviction (see Greenwood & Schulman, Vol. 7, No. 15; April 19, 1999).

Holding: (1) The Malik Court expressly overruled the Benson/Boozer line of cases and established a new standard by which to review sufficiency of the evidence [and stated] "No longer [would] sufficiency of the evidence be measured by the jury charge actually given" but rather it would "be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case." A hypothetically correct jury charge would not simply quote from the controlling statute. For example, it could not merely state that the defendant should be found guilty if he abducted "another person," when the indictment specifically alleged the defendant abducted "Williams." Likewise, when the controlling statute lists several alternative acts intended by the defendant and the indictment limits the State's options by alleging certain of those intended acts, the hypothetically correct charge should instruct the jury that it must find one of the intended acts

alleged in the indictment. This is the "law" "as authorized by the indictment."(2) We have not been consistent in requiring materiality, but have sometimes reversed upon a finding of variance without exploring the further question of materiality. Past inconsistencies in our application of the fatal variance doctrine may in part be due to the development of a sometimes conflicting line of cases establishing the "surplusage" doctrine and its exception. The general rule regarding surplusage is that "allegations which are not essential to constitute the offense, and which might be entirely omitted without affecting the charge against the defendant, and without detriment to the indictment, are treated as surplusage" and may be disregarded. The exception to the general surplusage rule, however, may run counter to the fatal variance doctrine. The exception provides that where an extra or unnecessary allegation "is descriptive of that which is legally essential to charge a crime, the State must prove it as alleged though needlessly pleaded." This special exception to the general surplusage rule (hereinafter called the "Burrell exception" because it is often attributed to Burrell v. State, 526 S.W.2d 799 (Tex.Cr.App. 1975), does not employ any materiality requirement. (3) In light of the principles underlying Malik and the above post-Malik cases, we hold that a hypothetically correct charge need not incorporate allegations that give rise to immaterial variances. (4) In so holding, we reaffirm the fatal variance doctrine and overrule surplusage law and the Burrell exception. (5) Malik overruled Ortega to the extent Ortega held evidentiary sufficiency should be measured by allegations in the application paragraph of the jury charge actually given. The Court of Appeals erred in relying on Ortega to hold that the State was bound to shoulder the allegations made in the jury charge concerning the model number of the go-cart.

Notes: Judge Keller delivered a concurring opinion in which she was joined by Judge Womack. She noted that the identity of a murder victim, the location of a building that was burglarized, and the description of an item that was stolen are all examples of descriptions of an offense element where the description is not listed in the statute. An indictment may contain such descriptive averments but the question is whether those averments would carry over into a hypothetically correct jury charge. She argued that, because they are not required to be pled, the answer is "no" and that, in this case, the go-cart's serial number need not have been pled. Judge Keasler delivered a concurring and dissenting opinion in which he was joined by Judge Hervey. He disagreed with the majority "overruling all surplusage law" and "analyzing this sufficiency claim in terms of whether Gollihar received notice . . .," He agreed, however, that Malik implicitly overruled Ortega and Burrell, and he stated that "The serial number of the go-cart was surplusage: descriptive of an element of the offense, but needlessly alleged."

Comments: For reasons that are too numerous to detail in depth, Judge Meyers is wrong, wrong, wrong. Judge Keasler, on the other hand, comes closest to getting it right. The problem that must be resolved for the reader before deciding which of the three opinions is correct is that Judges Keller and Keasler are talking about "serial" numbers, and Judge Meyers is talking about a "model number" which, of course, are as different as day and night. Saying a model number isn't important (i.e., "material") is like saying that all the State would have to prove is that the defendant stole a "Ford." I mean, who could ever decide what a "Ford" is worth. Now, deciding what a 1965 Ford Mustang Pony V8 is worth is much easier (remember, this is a sufficiency of the evidence question). Judging from the number involved, I would say we are talking about serial numbers rather than model numbers. Presuming that we are talking about serial numbers, Judges Keasler and Keller are correct, as that averment is not something the State would have to plead or prove. However, even if we're talking about model numbers, the majority opinion is about 19 pages too long, is internally inconsistent, and discusses areas of law that really don't have anything to do with the issue involved. A waste of too many trees.